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No. 88-1529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN M. BOEHM, TAX COMMISSIONER
OF THE STATE OF NEBRASKA,
Petitioner,

VS.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND
RAILGON COMPANY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Did the courts below correctly hold that the tax imposed on the property of car companies pursuant to Neb. Rev. Stat. §§77-624 to 77-633 (Reissue 1986) violates Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. §11503(b)(4)) when, under Nebraska law, 75% of commercial and industrial personal property (including business inventory, crops, livestock, and agricultural machinery and equipment) is exempt from property tax?

LIST OF PARTIES TO THIS PROCEEDING

The Petitioner is the Tax Commissioner of the State of Nebraska (referred to hereinafter as the "Commissioner").

Respondents are Trailer Train Company, Railbox Company and Railgon Company (referred to herein collectively as "Trailer Train"). Railbox and Railgon are wholly-owned subsidiaries of Trailer Train Company, a Delaware corporation whose shareholders are listed in Appendix A to this brief.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which is not yet reported, is reprinted in Appendix B to the Petition. The opinion of the United States District Court for the District of Nebraska, dated December 11, 1987, and which is unreported, is reprinted in Appendix A to the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISION INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. §11503.

The language of 49 U.S.C. §11503 as codified differs from the language of Section 306. The codification cannot, however, be construed as making any substantive change to the meaning of Section 306. *See* Pub. L. No. 95-473, §3(2), 92 Stat. 1466 (1978). In the opinions of both courts below, the courts have referred to the language of Section 306 rather than to the language of the codification in resolving issues of statutory construction. Accordingly, Trailer Train will refer to the language of Section 306 in this response. Section 306 is reprinted in Appendix C to the Petition.

STATEMENT OF THE CASE

Trailer Train is satisfied with the Statement of the Case contained in the Petition.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 17 of the Rules of this Court. Trailer Train respectfully submits that the Petition should be denied.

1. No Special or Important Reasons Exist for Granting the Writ.

The Commissioner makes three arguments, all of which turn on statutory interpretation of Section 306, as to why this Court should accept this case and

reverse the ruling of the United States Court of Appeals for the Eighth Circuit. The three arguments, however, simply state the Commissioner's conviction that the Eighth Circuit's decision was incorrect. The Commissioner has been unable to point to any reason that this case presents an issue so special or so important to the public that it should be accepted by this Court, other than that the provisions of Section 306 as interpreted by the Eighth Circuit "create a substantial and unwarranted intrusion into what historically has been an area of federal noninterference in matters pertaining to state and local tax policy." Petition, pages 26-27.

This complaint of interference with state tax policy is exaggerated and irrelevant. Nothing in the record of this case even remotely suggests that the exemption of Trailer Train's railcars from personal property taxation somehow endangers Nebraska's policy of fostering certain other industries by use of personal property tax exemptions. The State of Nebraska remains free to structure its tax system in any form it chooses, so long as the taxes that it imposes on the railroad industry are not discriminatory within the meaning of Section 306.

In addition, "interference" with state tax policy is an irrelevant consideration in Section 306 cases. During the course of congressional deliberations leading to the passage of Section 306, Congress fully considered the effects that anti-discrimination legislation would have upon state finances. *See, e.g.*, S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969). Congress concluded that national interests, e.g., revitalization of the nation's railroad system and elimination of economic burdens resulting from discriminatory state

taxation, must prevail over the parochial interests of the state in maintaining discriminatory tax systems. In enacting Section 306, Congress intended to eliminate state taxing schemes and practices that discriminated against the railroad industry. Congress gave the states three years within which to bring their statutes and practices into conformity with the act. See *Southern Railway Co. v. State Board of Equalization*, 715 F.2d 522, 523 n. 1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Although the Commissioner in this case refers to "what has historically been an area of federal noninterference," the area of state tax discrimination against railroad transportation property is one in which Congress made a well-informed decision to interfere. As recognized by this Court in *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 14 n.10 (1983), disruption of state finances is an inevitable consequence of congressional regulation of state taxation. Since interference with state finances was plainly anticipated by Congress, such disruption cannot be used as the reason for narrowly construing the types of discrimination which can be found to be in violation of Section 306.

In *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987), the respondents argued that Section 306 interfered with state tax policy, and that injunctive relief against state taxation offended the principle of comity. This Court stated:

> These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now.

Id. at 464. During the years of debate concerning Section 306 and its predecessors, Congress considered whether it should interfere with state tax policies. Congress finally determined that it must interfere, and that policy decision should govern this case now.

Ultimately, the Commissioner wishes this Court to review the finding of the district court below that Nebraska's exemption of 75% of its commercial and industrial personal property from ad valorem taxation, while continuing to tax all railroad transportation personal property, is a violation of Section 306. The Commissioner's insistence that this decision was incorrect is not a sufficient cause for this Court to review those findings.

2. No Conflict Exists among the Circuit Courts, or between the Decisions Below and Decisions of This Court, on the Issue of Whether Tax Exemptions can Result in Discriminatory Taxation.

Although the Commissioner does not expressly assert a conflict as a ground for this Court to accept this case, he does state the necessity of a "review by the Court to resolve the conflicting interpretations as to the scope of this subsection of Section 306 in situations involving exempt property." Petition, page 9. A close review of the Petition, however, shows that the only decision the Commissioner is able to cite as being "in conflict" with the decisions below is *Trailer Train Co. v. State Board of Equalization*, 538 F. Supp. 509 (N.D. Cal. 1982) ("*Trailer Train California*"). *Trailer Train California* is a district court opinion which, as far as Trailer Train has been able to ascertain, has never been followed on this proposition in any other federal court.

This is not the first time that *Trailer Train California* has been cited as creating a "conflict" which must be resolved by this Court. Following the decision of the Eighth Circuit in *Trailer Train Co. v. Bair*, 765 F.2d 744 (8th Cir.), *cert. denied*, 474 U.S. 1021 (1985), the Director of the Iowa Department of Revenue petitioned this Court for a Writ of Certiorari to the Eighth Circuit on virtually the same grounds that the Commissioner has stated in this case, including a citation of *Trailer Train California* as a conflict. This Court denied that petition. Nothing has changed since the denial of that petition to make review of this case any more necessary than was review of the *Bair* case.

Rule 17 of the Rules of this Court expressly requires a conflict among the circuit courts of the United States, not among the federal district courts. Every circuit court that has considered the issue has held correctly that exemptions of commercial and industrial property from ad valorem taxation must be taken into account in determining whether railroad property is being taxed discriminatorily under Section 306(1)(d). *See Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern Railroad Co. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984), *aff'd in part, remanded in part*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Board of Equalization*, 492 F. Supp. 446 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

In addition, *Trailer Train California* is not even a final decision. *Trailer Train California* was decided upon an application for preliminary injunction and no interlocutory appeal has been taken. Therefore, the district court's conclusions in *Trailer Train Califor-*

nia are preliminary, subject to change by the district court at any time prior to the issuance of its final decision, and should not be relied upon as indicative of a "split" among the lower federal courts.[1] *See, e.g, Rittmiller v. Blex Oil, Inc.*, 624 F.2d 857, 863 n. 6 (8th Cir. 1980); *Berrigan v. Sigler*, 499 F.2d 514 (D.C. Cir. 1974). Obviously, the "conflict" to which the Commissioner refers does not exist.

The Commissioner also refers to "the conflicting interpretations as to the scope of Section 306(1)(d) with regard to the consideration of such exemptions," and requests that this Court should issue the writ to resolve "these differing constructions." Petition, page 21. The Commissioner can cite only the same *Trailer Train California* decision in support of this "conflict." His references to *ACF Industries, Inc. v. State of Arizona*, 561 F. Supp. 595 (D. Ariz. 1982), *aff'd*, 714 F.2d 93 (9th Cir. 1983), and *Clinchfield Railroad Co. v. Lynch*, 784 F.2d 545 (4th Cir. 1986), are irrelevant as both of those cases involved Section 306(1)(a), regarding differing assessment ratios, rather than Section 306(1)(d), forbidding any other tax that discriminates. Neither the Ninth Circuit nor the Fourth Circuit has ever held that wholesale property tax exemptions should be disregarded when determining whether discrimination exists in violation of Section 306(1)(d).

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[1] *Trailer Train California* was fully considered and rejected by the Eighth Circuit in *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471 (8th Cir. 1983), notwithstanding the submission of an amicus brief by the State of California supporting the California court's interpretation.

CONCLUSION

Although Section 306 is important legislation, the issues raised in this case do not warrant review by this Court. The courts below applied this statute precisely as it is written and with the results intended by Congress. The petition does not present any ground for granting certiorari within the meaning of Rule 17 of the Rules of this Court and should be denied.

Respectfully submitted,

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